Supreme Court, U.S.
FILED
NOV 3 1992
OFFICE OF THE CLERK

No. 92-335

In The

Supreme Court of the United States

October Term, 1992

STATE OF ALABAMA,

Petitioner,

vs.

RICHARD COLE LEIGHTON,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court And Court Of Criminal Appeals Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

GARY E. DAVIS
Post Office Box 126
Centre, Alabama 35960
(205) 927-5513

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CASES ii

TABLE OF STATUTES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932) 3

Brown v. Ohio, 432 U.S. 166, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977) 5

Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990) 3

Harris v. Oklahoma, 433 U.S. 682, 53 L. Ed. 2d 1055, 97 S. Ct. 2912 (1977) 5

North Carolina v. Peace, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969) 5

STATUTES

Code of Alabama, 1975

Title 13A, Section 13A-11-72 2

Section 13A-11-73 2

No. 92-335

In The

Supreme Court of the United States

October Term, 1992

STATE OF ALABAMA,

Petitioner,

vs.

RICHARD COLE LEIGHTON,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court And Court Of Criminal Appeals Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On October 15, 1990, the respondent, Richard Cole Leighton, was convicted in the Municipal Court of the City of Centre, Alabama, of the offense of possession of a pistol without a permit. On October 9, 1990, some six (6) days prior to the entry of the plea in the Municipal Court of the City of Centre, Alabama, respondent was indicted by the Circuit Court of Cherokee County, Alabama, for the offense of possession of a firearm by a convicted felon.

SUMMARY OF ARGUMENT

Both cases arise out of the same set of facts as conceded by the petitioner, State of Alabama, in its brief filed with this Court. This Court has held that the Double Jeopardy Clause bars a subsequent prosecution if to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which a defendant has already been prosecuted. In the case at bar, respondent was convicted in the Municipal Court of the City of Centre, Alabama, of the offense which incorporates Section 13A-11-73 of the *Code of Alabama* (see appendix E of petitioner). Subsequent thereto, respondent was indicted by the Circuit Court of Cherokee County, Alabama, for the violation of Section 13A-11-72 of the *Code of Alabama* which charges a felony for the possession of a pistol by one who has been convicted for committing or attempting to commit a crime of violence (see appendix A of petitioner). The Cherokee County Circuit Court has ruled and the Court of Criminal Appeals for the State of Alabama has affirmed on the basis that because the respondent had been previously convicted of a felony, he was not eligible to obtain a permit. Therefore, possession of a firearm alone is a criminal act for one who has been previously convicted. Consequently, possession of a firearm constitutes a criminal offense and, in this case, it is a criminal offense for which respondent has already been prosecuted.

The Court of Criminal Appeals for the State of Alabama put it thusly:

> "The [respondent] is a convicted murderer who cannot legally obtain a pistol permit and for whom, therefore, the mere possession of a pistol constitutes both crimes."

Therefore, the petitioner in this case would ask the Court to ignore its ruling in *Grady v. Corbin* wherein this Court held that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2nd 548 (1990). Rather, the petitioner would have the Court do what it refused to do in *Grady v. Corbin*, and that is to return to the *Blockburger* test as the only test to be used in determining whether the Double Jeopardy Clause of the United States Constitution applies or does not apply [see *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 52 S. Ct. 180 (1932)]. The petitioner is attempting, by the vehicle of this case, to have the Court not just to clarify *Grady v. Corbin* as is stated in its brief, but it is actually a request to overrule *Grady v. Corbin*. Because of the facts as stated by the Cherokee County Circuit Court and by the Court of Criminal Appeals for the State of Alabama, we must all accept that the respondent is not one who could not legally obtain a pistol permit. That being the fact, the mere possession of a pistol, under whatever statute he might be sought to be prosecuted, would constitute a part of any other offense that also sought to prosecute him for possession of that same pistol on the same occasion. In this instance, it is quite clear that the operative fact in both prosecutions is the "possession" of the pistol. There

are no facts that could be presented in the Municipal Court different from those in the Circuit Court that would change the fact of the possession of the pistol which is "the offense" for which the respondent is guilty, whether prosecuted in the municipal ordinance or under the indictment in the present cause.

The questions asked at the onset of petitioner's brief represent the muddlement and confusion of the petitioner in attempting to present the question to the Court without asking the Court, in a backhanded way, to reverse the *Blockburger* decision. The petitioner asks, "Does this Court's decision and opinion in *Grady v. Corbin*, 495 U.S. 508 (1990), represent an abandonment of the principles announced in *Blockburger v. United States*, 284 U.S. 299 (1932), relating to multiple prosecutions each based in part on the same act?" The Court very clearly states in the *Grady* opinion that the *Blockburger* test, in fact, has not been abandoned and is the first test that is used. Then, in its opinion, this Court stated that the *Blockburger* test is not the last step of inquiry, but in fact, holds that the Double Jeopardy Clause bars a subsequent prosecution of an offense if to establish an essential element of an offense charged in that subsequent prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This goes a step beyond *Blockburger* and, in fact, is the step that the petitioner refuses to accept in the case at bar. The Circuit Court of Cherokee County, Alabama, and the Court of Criminal Appeals for the State of Alabama find, as a factual and legal matter, that the respondent has already been convicted of the conduct which the government will prove constitutes an offense

for which the defendant has already been prosecuted, i.e. possession of the pistol.

The petitioner's question number two (2) might be more clearly answered by saying that where a party by a single act commits two (2) offenses, "A" and "B", and is convicted of offense "A" and, in order to obtain a conviction of offense "B" of necessity proves "A", then the prosecution of "B" has been forestalled by the conviction of offense "A". The holding in *Grady* demands such a result because "a strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause." *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2nd 548 (1990).

It has been held in previous cases that the *Blockburger* test is not the exclusive test. The petitioner would have this Court hold that *Blockburger* is the exclusive test, go back to the year 1932 and ignore all subsequent law following 1932. *Brown v. Ohio*, 432 U.S. 166, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). *Harris v. Oklahoma*, 433 U.S. 682, 53 L. Ed. 2d 1055, 97 S. Ct. 2912 (1977). *North Carolina v. Peace*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969).

CONCLUSION

The petition for writ of certiorari should be denied unless this Court is willing to reverse the holding in *Grady v. Corbin* and adopt the *Blockburger* test as the final and only test to be applied on a Double Jeopardy Case.

Respectfully submitted,

GARY E. DAVIS
Post Office Box 126
Centre, Alabama 35960
(205) 927-5513

Attorney for the Respondent